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No. 08-1185

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GENA MARIE DUNPHY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government acknowledges, in its Ninth Circuit brief to which its Brief in Opposition refers, that the question presented here is one of "exceptional importance" on which "[t]here is an overriding need for national uniformity." Gvt. Pet. for Initial Hearing En Banc, *United States v. Fox,* Ninth Cir. No. 08-30445. The government also concedes that the circuits are currently split on the issue. Opp. 1. And the government does not dispute that this case is an ideal vehicle for resolving the conflict: Dunphy is a prime candidate for a below-Guidelines sentence, and her new within-Guidelines sentence depends on factual findings that violate the rules laid down in *United States v. Booker*, 543 U.S. 220 (2005), to the extent that decision applies to Section 3582 proceedings. *See* Pet. for Cert. 14-21.

The only question, therefore, is whether this Court should deny certiorari to wait and see whether the Ninth Circuit grants the government's petition for hearing en banc in *Fox* and decides to overrule its decision in *United States v. Hicks,* 472 F.3d 1167 (9th Cir. 2007) – or presumably to see whether any other circuit follows *Hicks.* The answer, for two reasons, is no.

First, the Fourth Circuit and other courts of appeals are wrong in holding that *Booker* does not apply to new sentences imposed in Section 3582 proceedings. The petition for certiorari explains why that is so. *See* Pet. for Cert. 15-26. And nothing in the government's brief in opposition in *Rhodes v. United States*, No. 08-8318, which the government incorporates here by reference, responds to the

petition's arguments. Instead, that brief is virtually a carbon copy of the Fourth Circuit's opinion (which itself simply parroted the brief the government filed in that court).

Perhaps the most telling example of the government's lack of any real argument on the merits is its proclamation that "18 U.S.C. 3582(c)(2) and U.S.S.G. § 1B1.10 authorize a narrowly focused proceeding in which a court has the authority to reduce a defendant's sentence only to the bottom of the amended Guidelines range." *Rhodes* Opp. 10. For starters, a court imposes an entirely new sentence in a Section 3582 proceeding; it does not "reduce" anything. *See* Pet. for Cert. 5-6, 17. More fundamentally, the question arises how such a proceeding, in the government's words, is "narrowly focused." It is not narrowly focused in terms of the information the sentencing judge is supposed to consider. The law directs the judge to consider all of the ordinary sentencing factors listed in 18 U.S.C. § 3553(a), and then some. *See* Pet. for Cert. 17. The only way that a Section 3582 proceeding differs from any other proceeding in which a court imposes a new sentence is that the Guidelines in a Section 3582 proceeding require the judge to treat the applicable sentencing range as binding. But that is exactly why *Booker* comes into play. All of the circuits that have ruled otherwise are simply buckling, in yet another round of litigation, to the government's refusal to come to grips with *Booker*.[1]

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[1] For previous iterations of this phenomenon, see *Nelson v. United States*, 129 S. Ct. 890 (2009) (per curiam) (reversing

Second, even if there were some doubt about the proper resolution of this issue, it would not make sense to await the Ninth Circuit's resolution of *Fox*. It will take that court several months or more to decide whether to take the issue en banc. In the unlikely event that it does grant the government's motion for an initial hearing en banc, it would take several more months (maybe years) to decide the case. It then would take this Court several more months to review that decision on certiorari and potentially on the merits. Meanwhile, petitioner and thousands of others like her in other circuits would languish in prison. Their current proceedings would either become final or – in what would be more appropriate under the circumstances – this Court will need to hold all of their petitions pending the Ninth Circuit's decisions.

It would be far better to resolve this extremely important issue now, once and for all. Not only would prisoners benefit from a prompt resolution of the issue, but a prompt resolution would be much better than requiring courts across the country to continue grappling with the issue and for lawyers on both sides to pour resources into the subject for years to come.

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court of appeals' decision treating the Guidelines as unduly binding); *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam) (same); *Moore v. United States*, 129 S. Ct. 4 (2008) (per curiam) (same); *Gall v. United States*, 128 U.S. 591 (2007) (same); *Kimbrough v. United States*, 128 U.S. 558 (2007) (same); *Rita v. United States*, 551 U.S. 338 (2007) (same).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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